

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## **ISSUE**

The issue is whether OWCP properly determined appellant's loss of wage-earning capacity, effective May 1, 2016, based on her capacity to earn wages in the selected position of receptionist.

## **FACTUAL HISTORY**

On July 18, 2007 appellant, then a 39-year-old transportation security screener, filed a traumatic injury claim (Form CA-1) alleging that on July 10, 2007 she hurt her lower back while lifting heavy bags in a checked baggage location. She noted that her lower back and the outside of her right leg hurt. OWCP accepted appellant's claim for sprain of the lumbar region of the back and displacement of lumbar intervertebral disc without myelopathy. Appellant was paid compensation on the supplement rolls commencing May 16, 2010, and was placed on the periodic rolls effective April 10, 2011.

Appellant underwent an OWCP-authorized fusion of the lumbar spine on April 15, 2011.

On May 28, 2013 appellant was evaluated by a vocational counselor who conducted tests and provided counseling.

By letter dated February 5, 2015, OWCP asked appellant's treating Board-certified physiatrist, Dr. Peter Gemelli, to complete a work restrictions evaluation form within 30 days. Dr. Gemelli did not submit a timely response.

By letter dated March 30, 2015, appellant was referred to Dr. Robert M. Moore, a Board-certified orthopedic surgeon, for a second opinion. In an April 20, 2015 report, Dr. Moore diagnosed lumbar degenerative disc disease, status post lumbosacral fusion. He opined that appellant was unable to perform her job of transportation security screener without restrictions. Dr. Moore indicated that appellant had residuals from her work-related condition, and that she was unable to perform bending, lifting greater than 10 pounds, climbing, or more than occasional walking or standing activities. He noted that the position descriptions for receptionist or front desk clerk were not supplied, but so long as the positions would not require lifting greater than 10 pounds on an occasional basis, climbing, bending, or more than occasional walking/standing activities, appellant would be able to perform the functional requirements of those positions.

In a supplemental report dated April 22, 2015, Dr. Moore noted that he reviewed the position descriptions of motel/hotel clerk and receptionist. He indicated that each of the positions was sedentary and did not require bending, climbing, more than occasional walking/standing, or more than occasional lifting of 10 pounds. Dr. Moore therefore opined that appellant was capable of performing the functional requirements of the two positions for eight hours per workday.

In a July 6, 2015 assessment, Dr. Gemelli diagnosed lumbar radiculopathy, lumbar degenerative disc disease, radiculitis, and muscle sprain. He opined that appellant was not capable of working at anything higher than a sedentary level and that driving to and from work would be an issue for her because of her medication. Dr. Gemelli disputed that appellant could

walk three hours a day and do pushing and pulling. In a September 10, 2015 note, he indicated that he had been treating appellant for an employment injury since 2010, that she had been through multiple procedures and surgery but remained in pain, that she was on two different schedule II narcotics to control her chronic pain, and that she also suffered from depression secondary to her inability to work. Dr. Gemelli opined that as a result of her employment injury and her medications, she was unable to drive and participate in gainful employment.

In a September 21, 2015 report, Dr. Thomas E. Melin, a neurosurgeon, diagnosed neck pain secondary to C5-6 degenerative disk/facet disease with mechanical neck pain, myofascial neck pain secondary to above, and lumbar post-fusion syndrome with posterior lumbar hardware L4 to S1 with lower back pain. He recommended injections at C5-6. Dr. Melin agreed that appellant was unable to drive or participate in gainful employment secondary to her work-injury.

Appellant's participation in the vocational rehabilitation program since 2013 did not result in her return to work. In a Rehabilitation Closure Report dated December 31, 2015, the vocational rehabilitation counselor found that appellant met the physical and skill level requirements for a position as a receptionist, and that this position was suitable and reasonably available in the local labor market. He noted that data combined with employer canvassing indicated that average entry level wages for this position were \$360.00 per week.

The Department of Labor, *Dictionary of Occupational Titles* (DOT) indicates that the selected position of receptionist (DOT No. 237.367.038) requires receiving visitors, answering telephone calls, and limited typing of documents. The position is sedentary in nature and requires frequent reaching, handling, and lifting up to 10 pounds.

On February 9 and 23, 2016 Dr. Gemelli administered appellant caudal interlaminar epidural steroid injections.

On March 2, 2016 OWCP proposed reducing appellant's compensation as it determined that she had the capacity to earn wages as a receptionist at the rate of \$360.00 per week. It informed her that she was vocationally and physically capable of working in the receptionist position. OWCP afforded appellant 30 days to submit evidence and argument challenging the proposed action.

By decision dated April 12, 2016, OWCP finalized the proposed reduction of benefits based on appellant's capacity to earn wages as a receptionist at the rate of \$360.00 per week.

On April 22, 2016 appellant, through counsel, filed a request for a telephonic hearing with OWCP's Branch of Hearings and Review. The hearing was held on December 6, 2016. By decision dated February 2, 2017, an OWCP hearing representative affirmed the April 12, 2016 decision. He found that the selected position of receptionist was physically and vocationally suitable for appellant and fairly and reasonably represented her wage-earning capacity.

### **LEGAL PRECEDENT**

Once OWCP has made a determination that a claimant is totally disabled as a result of an employment injury and pays compensation benefits, it has the burden of proving that the disability has ceased or lessened in order to justify termination or modification of compensation

benefits.<sup>3</sup> OWCP's burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>4</sup>

Under section 8115(a) of FECA, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent his or her wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity or if the employee has no actual earnings, his or her wage-earning capacity is determined with due regards to the nature of the injury; his or her degree of physical impairment, usual employment, age, and qualifications for other employment; the availability of suitable employment; and other factors and circumstances which may affect his or her wage-earning capacity in his or her disabled condition.<sup>5</sup>

OWCP must initially determine a claimant's medical condition and work restrictions before selecting an appropriate position that reflects his or her wage-earning capacity. The medical evidence relied upon must provide a detailed description of the condition.<sup>6</sup> Additionally, the Board has held that a wage-earning capacity determination must be based on a reasonably current medical evaluation.<sup>7</sup>

OWCP procedure instructs that, in cases where a claimant has undergone vocational rehabilitation, the vocational rehabilitation specialist will submit a final report summarizing why vocational rehabilitation was unsuccessful and listing two or three jobs which are medically and vocationally suitable for the claimant. Included will be the corresponding job numbers from DOT (or OWCP specified equivalent) and pay ranges in the relevant geographical area.<sup>8</sup> Once this selection is made, a determination of wage rate and availability in the open labor market should be made through contact with the state employee service or other applicable service. Finally, application of the principles set forth in the *Shadrick*<sup>9</sup> decision will result in the percentage of the employee's loss of wage-earning capacity.

In determining an employee's wage-earning capacity based on a position defined suitable but not actually held, OWCP must consider the degree of physical impairment, including impairments resulting from both injury-related and preexisting conditions, but not impairments resulting from post-injury or subsequently acquired conditions. Any incapacity to perform the duties of the selected position resulting from subsequently acquired conditions is immaterial to the loss of wage-earning capacity that can be attributed to the accepted employment injury and

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<sup>3</sup> *Betty F. Wade*, 37 ECAB 556 (1986); *Ella M. Gardner*, 36 ECAB 238 (1984).

<sup>4</sup> *See Del K. Rykert*, 40 ECAB 284 (1988).

<sup>5</sup> 5 U.S.C. § 8115(a); 20 C.F.R. § 10.520; *see Pope D. Cox*, 39 ECAB 143 (1988).

<sup>6</sup> *William H. Woods*, 51 ECAB 619 (2000).

<sup>7</sup> *John D. Jackson*, 55 ECAB 465 (2004).

<sup>8</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.8 (October 2009).

<sup>9</sup> *Albert C. Shadrick*, 5 ECAB 376 (1953).

for which appellant may receive compensation.<sup>10</sup> Additionally, the job selected for determining wage-earning capacity must be a job reasonably available in the general labor market in the commuting area in which the employee lives.<sup>11</sup>

### ANALYSIS

OWCP accepted that on July 10, 2007 appellant sustained a sprain of the lumbar region of her back and displacement of lumbar intervertebral disc without myelopathy. After a period of vocational rehabilitation, which did not result in appellant's reemployment, the vocational counselor found that appellant was capable of working as a receptionist with a wage of \$360.00 per week. After applying the *Shadrick* formula, OWCP determined appellant's loss of wage-earning capacity. OWCP reduced appellant's compensation based on these findings.

The position of receptionist is described as a sedentary position, and Dr. Moore, the second opinion physician, indicated that appellant was capable of the performing the functional requirements of the receptionist position. He indicated that although appellant had restrictions, the receptionist position was sedentary and did not require bending, climbing, more than occasional walking/standing, or more than occasional lifting of 10 pounds. However, Dr. Gemelli, appellant's treating physician, disagreed with this assessment. He noted that appellant remained in chronic pain. Dr. Gemelli opined that as a result of her work injury and medication usage, appellant was limited to sedentary activity, but was unable to drive and participate in gainful employment.

It is well established that when there are opposing medical reports of virtually equal probative value between an attending physician and a second opinion physician, 5 U.S.C. § 8123(a) requires OWCP refer the case to a referee physician to resolve the conflict.<sup>12</sup> Dr. Moore indicated that appellant could work in a sedentary position. Dr. Gemelli has submitted multiple reports detailing his treatment of appellant. He opined that appellant was unable to participate in gainful employment. Dr. Gemelli's opinion is supported by the opinion of Dr. Melin, a neurosurgeon, who also found appellant unable to participate in gainful employment secondary to the results of her work injury. Dr. Melin explained that appellant had lumbar post-fusion syndrome, with posterior lumbar hardware L4 to S1, and low back pain.

The Board finds that the medical report of Dr. Gemelli is in equipoise with the opinion of Dr. Moore as to whether appellant is capable of working in the sedentary position of receptionist. As the opposing medical reports are of virtually equal weight and rationale, the Board finds that there is an unresolved medical conflict as to appellant's capacity to work as a receptionist. As this conflict was not resolved, OWCP failed to establish that the selection position of receptionist was proper.

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<sup>10</sup> *James Henderson, Jr.*, 51 ECAB 619 (2000).

<sup>11</sup> *Albert L. Poe*, 37 ECAB 684 (1986); *David Smith*, 34 ECAB 409 (1982).

<sup>12</sup> *See P.C.*, Docket No. 15-1013 (issued June 15, 2016).

**CONCLUSION**

The Board finds that OWCP did not properly determine appellant's loss of wage-earning capacity, effective May 1, 2016, based on her capacity to earn wages in the selected position of receptionist.

**ORDER**

**IT IS HEREBY ORDERED THAT** the decision of the Office of Workers' Compensation Programs dated February 2, 2017 is reversed.

Issued: January 3, 2018  
Washington, DC

Christopher J. Godfrey, Chief Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board